

February 11, 2009

Mr. Anthony J. Preite, Director
Montana Department of Commerce
P.O. Box 200501
Helena, MT 59620-0501

Re: Research and Commercialization Board

Dear Mr. Preite:

You have requested advice from this office as to the question of whether the constitutional doctrine of separation of powers is violated by Mont. Code Ann. § 2-15-1819, which provides that members of the legislative leadership have the power to appoint four of the six members of the Research and Commercialization Board. This office does not issue formal opinions as to the constitutionality of statutes, and it has therefore been determined that an opinion on this question would be inappropriate.

Your letter indicates that it is not clear how a constitutional issue might be present. Generally, article III, section 1 of the Montana Constitution divides the sovereign power of the State into three distinct branches--legislative, executive, and judicial--and provides that one branch may not exercise a power or function that belongs to another branch. I believe the question posed to you is whether the exercise by members of the legislature of the power to appoint members of an executive branch board constitutes a usurpation of an executive function by the legislature.

The question, then, is whether the appointive power is exclusively an executive function. I have found no prior opinions of this office or Montana case law on this point. However, the Montana Supreme Court has held that the doctrine of separation of powers is not a rigid, black and white prohibition, but rather a flexible standard under which powers of the branches may overlap for the convenience of the government. State ex rel. Judge v. Legislative Finance Committee, 168 Mont. 470, 478-79, 543 P.2d 1317, 1321 (1975), citing with approval State ex rel. Hills v. Sullivan, 48 Mont. 320, 330, 137 P. 392, 395 (1913).

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Section 2-15-1819 is not alone in providing a legislative voice in the membership of an executive board. See, e.g., Mont. Code Ann. § 2-15-1028 (members appointed from nominations submitted by leadership in each legislative house); Mont. Code Ann. § 2-15-1808 (non-voting members appointed by legislative leadership); Mont. Code Ann. § 2-15-1820 (legislative members appointed by legislative committee on committees); Mont. Code Ann. § 2-15-1869 (council must have two legislative members); Mont. Code Ann. § 2-15-2021 (legislative members appointed by legislative committee on committees). It can be argued with some force that these appointments are common and that governmental convenience is advanced by them. However, Judge and Hills create no bright line test. Prediction of the outcome in the case you present is therefore not possible.

I hope you find this letter helpful. It may not be construed as an official opinion of the Attorney General.

Sincerely,

CHRIS D. TWEETEN
Chief Civil Counsel

cdt/jym